United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-2324

(41868)

To be argued by
MURRAY L. LEWIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

LUMUMBA SHAKUR, *et al.*,
Plaintiffs-Appellees,

GEORGE F. McGRATH, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

Statement

The United States District Court for the Southern District of New York (Knapp, J.), on August 1, 1974, held that plaintiffs' complaint, served on defendants, constituted substantial compliance with § 50-e of New York State's General Municipal Law, which requires a notice of claim be served upon a municipality as a prerequisite to the commencement of an action. The Court, therefore, denied defendants' motion to dismiss the pendent malpractice claim (9a).* The District Court, pursuant to 28 U.S.C.

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* Numbers in parentheses refer to pages in the appendix.

§ 1292 (b), certified its decision to this Court (12a-13a), which granted leave to defendants to appeal the determination (7a). Thereafter defendants moved to remand contending that the Court below was mistaken as to the facts in holding that notice of the malpractice claim was given in a complaint served within 90 days of the last treatment. This Court denied the motion but did not deny defendants their right to argue that point.

Questions Presented

1. Did the service of the original and first amended complaints herein, neither of which set forth claims for malpractice on the defendants stand in the stead of service of the notice of claim, which is required by General Municipal Law § 50-e?

2. Did service upon the defendants of plaintiffs' second amended complaint, setting forth a claim for malpractice, provide the required notice?

3. Was notice of the pendent malpractice claim given to the City of New York within 90 days after the cause of action arose as required by General Municipal Law § 50-e?

Facts

For purposes of this appeal, it is assumed that the plaintiff, Lee Berry,* was suffering the physical ailments claimed in the various papers before this Court, and that the treatment he purportedly received in the

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* The pendent malpractice claim is made only on behalf of this plaintiff; no such claim is averred for the other plaintiffs.

Men's House of Detention, Bellevue Hospital, and Riker's Island, was as alleged. What is pertinent to this appeal are dates of service and the contents of the various papers served by plaintiffs on one or more of defendants:

September, 1969: A writ of habeas corpus on behalf of Lee Berry is filed in the Supreme Court of the State of New York, County of New York, against George F. McGrath, Commissioner of Corrections of the City of New York, with the affidavit of Dr. Bronston, annexed thereto (61a-68a). This writ seeks Berry's release from detention or transfer to a hospital (66a).

October, 1969: The summons and original complaint in this action is filed naming only George F. McGrath as a defendant (1a).

December, 1969: An amended complaint is filed naming Frank S. Hogan as a defendant (1a). Both complaints seek relief under the Civil Rights Law.

April, 1970: A writ of habeas corpus on behalf of Lee Berry is filed in the Supreme Court, State of New York, County of New York, against George F. McGrath, as Commissioner of Corrections of the City of New York, with the affidavit of Dr. Cordice, annexed thereto (72a-94a). This writ seeks a reduction in bail (94a).

July 10, 1970: A notice of motion and affidavit is filed to amend the complaint, adding, among other things a pendent malpractice claim and adding City doctors as party-defendants (95a-102a).

The aforementioned dates must be considered together with the dates of treatment of Berry:

April 3, 1969: Berry is arrested while a patient at the Manhattan Veterans' Administration Hospital, and placed in the Men's House of Detention (78a).

November 24, 1969: Berry is transferred to Bellevue Hospital (71a).

March 11, 1970: Berry is transferred from Bellevue Hospital to the Riker's Island Prison Infirmary (72a).

March 19, 1970: Berry is returned to Bellevue Hospital.

The pendent malpractice claim is only alleged against Dr. Plew, who is the Medical Director of the Department of Corrections, and Dr. Collins, who is on the Medical Staff of the Manhattan House of Detention. Based on the foregoing dates, it is obvious that Dr. Collins' treatment of Berry ended on November 11, 1969, and that Dr. Plew's involvement (he never personally attended Berry) ended when Berry was transferred back to Bellevue Hospital from Riker's Island on March 19, 1970.

It is New York City's contention that the only notice of any kind that it received of a pendent malpractice claim was on or about July 10, 1970, which was more than 90 days after the last possible date of treatment by the doctors involved. Plaintiffs have conceded to this Court, in its memorandum and oral argument on defendants' motion to remand, that the July 10, 1970, notice of motion was served later than 90 days after last date of treatment. However, plaintiffs contend that the writs of habeas corpus, the doctors' affidavits annexed to the petition for writs, and the commencement of this action, together with the first amended complaint, constituted notice to the City of New York, and was substantial compliance with § 50-e of the General Municipal Law.

ARGUMENT

Plaintiffs failed to serve the City of New York with a notice of claim as required by General Municipal Law § 50-e. The two habeas corpus proceedings and affidavits and petitions annexed thereto and the commencement of this action, did not constitute substantial compliance with the section so as to negate the requirement of service of a formal notice of claim.

Additionally, plaintiffs failed to apprise the City of New York of any possible malpractice claim within 90 days of the last treatment by the doctors involved, as required by § 50-e.

The Court below held that the complaint served in this action (apparently referring to the original or first amended complaint) constituted substantial complaince with § 50-e, and that the same was served within 90 days of the time the action arose (11a). It is respectfully submitted that the Court below erred in its application of the law and misapprehended the relevant facts, and that this Court must reverse the determination dismissing the pendent malpractice claim.

(1)

Plaintiffs have alleged a pendent malpractice claim against two doctors employed by the City of New York; the City itself is not named as a party-defendant. Section 50-d of the General Municipal Law provides that the City of New York shall indemnify a physician employed in City institutions, provided, however, the provisions of § 50-e of the General Municipal Law are complied with *Derlick* v. *Leo*, 281 N.Y. 265 (1939). Section 50-e requires that a notice of claim be served upon the City as a condition precedent to the commencement of an action for

malpractice in a City institution even where the City itself is not sued but only the doctors or other City employees. See Section 50-e, subd. 1; *Derlick* v. *Leo, supra.* The failure to file such a notice of claim is a jurisdictional defect *Teodoro* v. *Town of Babylon,* 56 Misc. 2d 476 (Dist. Ct., Suf. Co., 1968).

In the within action, it has been conceded that no formal notice of claim has been served upon the City. Plaintiffs, however, contend that the service of the writs of habeas corpus, and the commencement of this action constituted such notice. The Court below concurred with plaintiffs to the exent of holding that service of "the complaint" herein constituted substantial compliance with § 50-e.

It is submitted that this holding is contrary to the law of the State of New York as declared by its highest Court. In *P. J. Panzeca, Inc.* v. *Board of Education,* 29 N Y 2d 508 (1971), the Court of Appeals, unanimously directing the dismissal of a complaint stated (p. 510):

> "Although technical defenses in abatement are not favored where prejudice has not resulted, courts may not relieve a litigant of a positive statutory mandate, even to avoid a harsh result (*Munroe* v. *Booth,* 305 N. Y. 426, 428). The controlling statute distinguishes between an action and the filing of a claim, and the filing is a precondition to the bringing of an action. It is, therefore, no answer that the action or another action was brought within the time limit for the filing of a claim, and the action papers provide all the requisite detail and more (cf. *Matter of Board of Educ.* [Heckler Elec. Co.], 7 N Y 2d 476, 483-484.)"

See also: *Moore* v. *New York City Housing Authority,* 35 A D 2d 553 (2nd Dept., 1970); *Murray* v. *City of New*

York, 40 A D 2d 539 (2nd Dept., 1972); *Torres* v. *Board of Education of the City of New York,* 13 A D 2d 948 (1st Dept., 1961); *Hackenbach Water Co.* v. *Village of Nyack,* 289 F. Supp. 671 (DCNY 1968); *Gregory* v. *City of New York,* 346 F. Supp. 140 (DCNY 1972).

In *Torres, supra,* Mr. Justice Steuer, in a concurring opinion, at p. 949, said:

> "If the contrary were the law, a suit within the statutory period would dispense with notice and the contention (made frequently in the days when the statute was enacted and less often since then) that the complaint was notice, would not have been universally and summarily rejected. (*Arthur* v. *Village of Glens Falls,* 66 Hun 136; *Dawson* v. *City of Troy,* 49 Hun 322; *Bauer* v. *City of Buffalo,* 44 N. Y. St. Rep. 814, 18 N.Y.S. 672; see *Natoli* v. *Board of Educ.,* 277 App. Div. 915, affd. 303 N. Y. 646)."

(2)

The Court below attempted to distinguish *P. J. Panzeca, Inc., supra,* on the ground that that case involved § 3813 of the Education Law, which section the Court stated was "wholy different from the controlling language in § 50-e" (12a). However, paragraph 2 of § 3813 specifically provides that a notice of claim must be served in accordance with § 50-e. It is submitted that the *Panzeca* case is not distinguishable from the facts presented herewith, and that that determination by the highest court of the State of New York is controlling; i.e., service of the complaint does not take the place of the service of a notice of claim.

Seemingly, there are two determinations which do support the decision of the Court below, to wit, *Quintero* v. *Long Island Railroad,* 31 A D 2d 844 (2nd Dept., 1969),

and this Court's decision in *McCabe* v. *Nassau County Medical Center*, 453 F. 2d 698. These decisions, however, were prior to *Panzeca*, and in any event are clearly distinguishable.

In *Quintero* the Appellate Division affirmed solely because of the "special facts and circumstances of the case." In that case the lower court (55 Misc. 2d 813) gave relief to the plaintiff because the transfer of operation of the Long Island Railroad to the Metropolitan Transportation Authority had been accomplished a short time before plaintiff's accident. The Court held that the transfer was through a "quiet amendment" (p. 816), and that even lawyers and judges who had responsibility or were engaged in that area of the law had no knowledge of the new requirements for suits against the Long Island Railroad. No such condition exists here.

In *McCabe* this Court relied on *Quintero*, and further pointed out that the major relief originally sought was equitable in nature, which did not require the filing of a notice of claim.

The Courts of the State of New York have definitively spoken. A complaint cannot be used in place of a notice of claim. It is a condition precedent that in a suit against a municipality a notice of claim be served upon the municipality. In this case no notice of claim was served, and this suit cannot be continued as against the doctors or indemnification obtained from the City.

(3)

Even assuming, *arguendo*, that service of a complaint could be held to be substantial compliance with the requirements of § 50-e, such a complaint must still be served within 90 days from the time the cause of action arose.

Plaintiffs have conceded that if the writs of habeas corpus and the first and second complaints served in this action cannot be construed to give notice, then the only notice given was the motion of July 10, 1970, which was served later than 90 days. It is submitted that the City had no notice of any claim for malpractice until the notice of motion July 10, 1970.

The test of the sufficiency of notice to avoid prejudice to a municipality, as stated in *Widger* v. *Central School District*, 18 N Y 2d 646 (1966), is whether the notice sufficiently informed the municipality of the nature of the claim, of the time when, the place where, and the manner in which the claim arose, so as to enable the municipality to investigate the claim. In this instance, the original and first amended complaints gave no notice of a medical malpractice claim.

The facts alleged in the original complaints gave notice of a possible violation of the Civil Rights Law (for which the City would not be responsible) but made no claim of medical malpractice. In *Santiago* v. *Board of Education of the City of New York*, 41 A D 2d 616 (1st Dept., 1973), plaintiffs sent to the Board of Education a letter, five days after the event complained of, by registered mail. The majority opinion held that this letter "which was written in connection with other matters, and contained only a passing reference to the assault [which was the subject matter of the lawsuit]" did not constitute notice, as "the letter did not contain any claim of tort liability" (p. 616).*

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* The Court also held that the letter was not forwarded to a proper official of the Board of Education, as required by statute, as it was served on the Chairman and Members of the Community School Board. The same results must obtain herein as these complaints were served only on the Commissioner of Corrections and not upon the proper officials designated by statute.

In this case both of these complaints were concerned with violations of the civil rights of plaintiffs, and not with liability for medical malpractice. It is, therefore, submitted that these documents cannot be construed as substantial compliance with § 50-e.

(4)

Inasmuch as plaintiffs have conceded that the July 10, 1970 motion was served after the 90-day limitation of § 50-e, that notice of motion cannot be considered as compliance with the statute.

No notice of claim, whether it be a formal notice or in the form of a complaint or motion, has ever been served upon the City within 90 days of the date the action accrued. It is submitted that the Court below, when it held that the "plaintiffs have established that they served the complaint in this action within 90 days" (11a) was referring to the original complaint and erred in its holding that this complaint constituted substantial notice under § 50-e, for, in fact, no notice of a medical malpractice claim was made therein. It is submitted that this confusion developed as a result of the practice of plaintiff in referring to the second amended complaint (or third complaint) as the original complaint and referring then to service thereof being made in October 1969.

The City was not apprised of a medical malpractice claim and the motion below to dismiss the pendent malpractice should have been granted.

(5)

It is submitted that the habeas corpus proceedings and the papers filed therein are not a basis for a holding that there was substantial compliance with

§ 50-e. In those proceedings, against the Commissioner of Corrections, the defense of the proceedings was as mandated, by the District Attorney's office, and therefore, no notice was given to the City. Further, the Commissioner of Corrections is not a proper party, as delineated by the General Municipal Law to serve a notice of claim.

In addition, a habeas corpus proceeding does not evidence an intention of making a claim against the City. Facts might be presented therein that could be construed as possible grounds for a civil claim, but such a proceeding does not set in motion the investigatory arm of the City; no investigation would be made. It is fundamental that the purpose of § 50-e is to permit a prompt investigation into the facts underlying a claim (*Powell* v. *Town of Gates*, 36 A D 2d 220 (4th Dept., 1971)) and in this instance no such investigation was undertaken because no notice of claim was given to the City.

The same reasoning as above applies to the service of the original and second complaint in the within proceeding. In both of those complaints the action was against the Commissioner of Corrections and the District Attorney of New York County, and alleged a violation of the Civil Rights Law of the United States. Nothing was shown which would predicate a belief that a claim was being made for malpractice as against two doctors employed by the City.

CONCLUSION

It is respectfully submitted that upon the facts of the law, the decision of the Court below should be reversed and the pendent malpractice claim dismissed, with costs.

January 10, 1975.

Respectfully submitted,

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